UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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Office of the General Counsel
Memorandum

Date: September 12, 2008

TO : Acting Chairman Nancy A. Nord

FROM : Cheryl A. Falvey, General Counsel CAF

SUBJECT : Retroactive Application of the CPSIA to Inventory

In light of requests for guidance at our public meeting on September 4, 2008, you have asked the Office of the General Counsel to provide you with this advisory opinion to provide to the public on whether section 101 regarding lead in the Consumer Product Safety Improvement Act of 2008, Public Law 110-314, 122 Stat. 3016 (August 14, 2008) ("CPSIA") applies to product in inventory or on stores shelves prior to the effective date of those provisions, February 10, 2009, or only to product manufactured after that date. This memorandum sets forth the legal analysis supporting our conclusions that products that contain lead above the limit set in the CPSIA cannot be sold from inventory or on store shelves after February 10, 2009.[1]

The canons of statutory construction dictate that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). Section 101 of the CPSIA limits the amount of lead that can be in products designed or intended primarily for children twelve or younger. Effective 180 days after enactment or February 10, 2009, any children's product[2] that contains more than 600 ppm of lead "shall be treated as a banned hazardous substance under the Federal Hazardous Substances Act ('FHSA')." CPSIA § 101(a). CPSIA makes explicit that any ban imposed or rule promulgated under the lead section will be considered a regulation of the Commission promulgated under or for the enforcement of section 2(q) of the FHSA. CPSIA § 101(g). Under section 2(q)(1) of the FHSA, a banned hazardous substance means any toy or article intended for children, which is a hazardous substance, or which bears or contains a hazardous substance in such manner as to be susceptible of access by a child to whom such toy or other article is entrusted. 15 U.S.C. § 1261(q)(1).

In addition, section 216 of the CPSIA, entitled "Prohibited Acts," makes it unlawful for any person to "sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product…that is a banned hazardous substance within the meaning of section 2(q)(1) of the [FHSA]." CPSIA § 216(a)(2)(D). Thus, with respect to lead,

[1] This advisory opinion, which was prepared by CPSC staff, has not been approved by and may be changed or superseded by the Commission.

[2] The term "children's product" is defined in the CPSIA at section 235(a) (amending section 3(a)(16) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2052(a)(16)).

the question presented is whether the plain language of the statute sufficiently conveys congressional intent to apply this new ban under the FHSA (or 600 ppm lead limit) retroactively to children's products in inventory prior to the effective date of this new lead limit.

In deciding whether the new lead limit applies retroactively to inventory and product on store shelves, this office has fully considered the precedent that there must be an unmistakable congressional intention that the law apply retroactively. The Supreme Court held in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), that "[r]etroactivity is not favored in the law. . . . [C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *See also Jahn v. 1-800 Flowers.com, Inc.*, 284 F.3d 807, 810 (7th Cir. 2002), *cert. denied,* 537 U.S. 882 (2002) ("Federal regulations do not, indeed cannot, apply retroactively unless Congress has authorized that step explicitly.") The Supreme Court in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), articulated a two-step test for determining whether a federal statute applies retroactively. First, if Congress has clearly provided that a statute will apply retroactively, the analysis goes no further. *Id.* at 264. However, absent clear congressional intent favoring retroactive application, the second step of the *Landgraf* test requires a determination of whether the new provision attaches new legal consequences to events completed before its enactment such that it interferes with familiar considerations of fair notice, reasonable reliance, and settled expectations. *Id.* at 269-70.

It can be argued that Congress has provided that the lead limits in the CPSIA will apply retroactively by its having amended the statute to treat products over the lead limit as banned hazardous substances and by having included the sale of products to which FHSA bans apply as one of the acts prohibited under the statute. If children's products with more than 600 ppm of lead are to be treated as banned hazardous substances, then the ban is applicable to them at the effective date of that treatment regardless of the date of manufacture of the product. In other sections of the CPSIA, Congress specifically states that certain rules apply to product manufactured after the effective date of the provision. With regard to the new third-party testing requirements for children's products, for example, Congress stated that testing requirement "shall apply to any children's product ***manufactured*** more than 90 days after the Commission has established and published notice of the requirements for accreditation of third-party conformity assessment bodies."[3] CPSIA § 102(a)(3)(A). While Congress may never explicitly state that the lead ban applies retroactively to inventory, it did not condition the applicability of the lead ban to product manufactured after a certain date as it did in other sections of the statute. "It is generally assumed that Congress acts purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (citing *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)). Since Congress has provided that the third-party testing requirement applies only to children's product manufactured 90 days after the establishment and publication of accreditation procedures, its failure to use the same language with regard to the lead limit appears to be intentional. The prohibited acts section of the CPSIA is effective in September 2008, well before the new lead

[3] Congress also recognized that its requirement that catalogues and other printed material contain choking hazard warnings might impact catalogues that had been printed before the effective date in the statute and provided that the Commission could allow a 180 day grace period for previously printed materials. CPSIA § 105. Congress chose to include the option of a grace period for inventory, albeit previously printed catalogues, and did not do so for children's products in inventory that may contain lead above the 600 ppm limit.

limits take effect, so it can be argued that Congress sequentially timed the effective dates to make the lead provisions retroactive.

Similarly, Congress did not extend the existing exception in section 9(g)(1) of the CPSA for inventory manufactured prior to the effective date of a consumer product safety standard to the similar rules, regulations, standards and bans now covered under the expanded prohibited acts section of the CPSIA. Section 9(g)(1) provides that, "[a] consumer product safety standard shall be applicable only to consumer products manufactured after the effective date." 15 U.S.C. § 2058(g)(1). The FHSA does not have a provision comparable to section 9(g) of the CPSA that spells out whether a ban is applicable only to product manufactured after the effective date. In the past, when the agency has determined that a product shall be treated as a banned hazardous substance, it has sometimes applied the ban retroactively to inventory and sometimes it has not. The following examples, each of which is distinguishable and not dispositive here, provide some context on how the FHSA has been used both prospectively and retroactively. In 1988, legislation went into effect that required the Commission to amend its regulations within 60 days of enactment and revoke an exemption for lawn darts not marketed for children's play. In that instance, the Commission revoked the exemption and applied the ban "as to all products in the chain of distribution" on or after the effective date. *See, e.g.,* 53 FR 46828 (Nov. 18, 1988). Likewise, in 2003 when banning metal-cored candlewicks containing lead and candles with such wicks, the Commission adopted a 180 day effective date and decided that inventory would not be usable after that date. 68 FR 19142 (April 18, 2003). The Commission stated that "the 180-day effective date provides time for manufacturers, distributors, and importers to make any necessary changes to bring their products into compliance with the regulations." *Id.* at 19145. However, when banning dive sticks in 2001, the Commission adopted a 30 day effective date and that applied to "dive sticks entering the chain of distribution after that date." 66 FR 13650 (March 7, 2001). The Commission supported its decision on the effective date with the fact that few if any dive sticks were on the market given significant recall activity due the hazard, it would be relatively simple to redesign the product to comply with the rule and alternative products such as dive rings were readily available. While this precedent may not be relevant for reaching a conclusion based on the plain meaning of the statute, it does suggest that FHSA bans can apply retroactively.

On the other hand, it can be argued that Congress recognized the need for an orderly marketplace transition when it phased in the lead limit on a rolling basis. It restricted stockpiling of non-complying goods by expanding the Section 9 prohibition on stockpiling to cover products banned under the FHSA. CPSIA § 213. The February 2009 lead limit of 600 ppm in children's products is lowered to 300 ppm in August of 2009. This suggests some intent to permit sale of product entered into the ordinary stream of interstate commerce at the then applicable 600 ppm limit prior to the effective date for the lower 300 ppm limit. It would certainly seem that given this graduated decrease in the limit over time, a manufacturer could rely on the 6 month limit of 600 ppm lead for purposes of manufacturer during the period February 2009 to August 2009 and, so long as the manufacturer is not stockpiling product, work during that 6 month period to determine how to begin manufacture in August 2009 at the 300 ppm limit.[4] This too would be

[4] Congress also chose to provide that a new rule to be issued by the Commission on cribs was to be applied retroactively. In section 104 of the CPSIA on durable infant and toddler standards, Congress states that the crib standard issued by the Commission must apply to cribs already in use, including in such places as hotels and day

consistent with due process concerns that parties cannot be made to meet prospective new regulatory requirements absent express congressional language to the contrary. This view is reinforced in the Senate conference report on H.R. 4040 where it was noted that the legislation established "the most comprehensive lead safety standards that we have seen to date for toys and the paint manufacturers use on toys. These standards are implemented responsibly to give manufacturers time to adapt, without compromising safety." 154 Cong. Rec. S7877 (daily ed. July 31, 2008) (statement of Sen. Hutchison). Here, the government is imposing a new requirement limiting total lead content across a broad array of children's products in a variety of industries, each with their own inventory issues and testing questions regarding the application of the law to the component parts of their products and with varying financial impacts. The Commission would ordinarily look at these issues in setting an effective date and balance them against the hazards and risks in determining the applicability to inventory to be clear both as to prospective effective dates and the testing schemes that will be acceptable to denote compliance after the effective date.

On balance, it appears that the 600 ppm lead limit applies to product in inventory or on store shelves as of the effective date of February 10, 2009. While the case law suggests that in determining this issue the courts will take a demanding approach to finding unambiguous direction from Congress to apply laws retroactively, given the strength of the congressional language that these products shall be treated as banned hazardous substances and the strong prohibition against their sale, the CPSIA read as a whole suggests that the statutory provisions on lead limits apply to inventory. Products with more than 600 ppm of lead must come off the shelves no later than February 10, 2009, 180 days after enactment.[5]

Congress also required a more stringent lead paint ban to reduce the lead limit in paint from 600 ppm to 90 ppm under the Commission's regulations at 16 C.F.R. § 1303.1, effective one year of the enactment of that act, or August 14, 2009. CPSIA § 101(f). Congress further mandated that any ban imposed or rule promulgated under section 1303.1 would also be considered a regulation of the Commission promulgated under or for the enforcement of section 2(q) of the FHSA. CPSIA § 101(g). For the same reasons proffered above, we believe that the new provisions on the lead paint limit would similarly apply retroactively to ban the sale of any product containing amounts over the new lead paint limit of 90 ppm in inventory or on store shelves on the effective date of those provisions, August 14, 2009.

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care centers. CPSIA § 104(c). So Congress clearly expressed retroactive intent with regard to cribs in section 104 of the CPSIA. However, since existing CPSA section 9(g) expressly states that new consumer product safety standards apply only to product manufactured after the effective date, it could be argued that such an express statement was not needed with regard to the FHSA lead ban since no provision like section 9(g) exists to limit the ban to product manufactured after the effective date.

[5] This analysis would also apply to children's products that contain lead levels above the 300 ppm lead limit which cannot be sold from inventory or on store shelves after August 14, 2009, as well as to children's products that contain lead above 100 ppm, if it is deemed technologically feasible, after August 14, 2011.